IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1066

CITIZENS TO PRESERVE OVERTON PARK, INC., WILLIAM W. DEUPREE, SR., SUNSHINE K. SNYDER, SIERRA CLUB, and NATIONAL AUDUBON SOCIETY,

Petitioners,

v.

JOHN A. VOLPE, Secretary
Department of Transportation,
and
CHARLES W. SPEIGHT, Commissioner
Tennessee Department of Highways,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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1. In *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268 (1969), this Court followed the "general rule . . . that an appellate court must apply the law in effect at the time it renders its decision" (footnote omitted) 393 U.S. at 281. It held that a Department of Housing and Urban Development circular was applicable even though issued after the eviction proceedings involved in that case

had been initiated. Under the holding in *Thorpe*, the Department of Transportation Regulation issued on October 7, 1970 (DOT Order 5610.1) requiring formal findings by the Secretary of Transportation in cases involving 49 U.S.C. (Supp. V) § 1653(f) is applicable here, and the decision below must be reversed because of the Secretary's admitted failure to make the required findings.

Secretary Volpe argues that because the state has acquired the right-of-way for this route, this case comes within the narrow exception, stated in *Thorpe*, where the general rule is not applied in order "to prevent manifest injustice." (Footnote omitted.) 393 U.S. at 282. That position is untenable for three reasons.

(a) The DOT Order establishes procedures for administration of statutes designed to preserve park lands. Since the construction of this route through Overton Park has not begun and harm to the park has not yet been inflicted, this case is precisely analogous to *Thorpe* where, at the time of decision in this Court, the tenant had not been evicted. Thus with respect to the preservation of the park, there has not been, as suggested by the Secretary, any "change in circumstances" which would render the general rule stated in *Thorpe*, and the DOT Order, inapplicable.

(b) The Secretary was unable to point to any evidence of right-of-way acquisition or any other change in circumstance occurring subsequent to Secretary Volpe's approval of the design of the highway in November 1969. Indeed he does not even argue that there has been any change of circumstances since that decision. Therefore, even under the Secretary's interpretation of *Thorpe*, the November 1969 decision must be judged in light of the DOT Order, and since it is undisputed that Secretary Volpe made no formal findings, petitioners are entitled to judgment on that issue.

(c) The Secretary argues that the April 1968 approval of the location of this highway should not be reviewed under the DOT Order because, says the Secretary, right-of-way adjacent to and in the park has been acquired by the

state subsequent to that approval. The record shows, however, that the Department of Transportation authorized the acquisition of that right-of-way in May 1967, nearly a year *prior* to the April 1968 decision. (A. 28) Furthermore the Secretary apparently concedes that the Department authorized the acquisition of this right-of-way without making the determinations required by 49 U.S.C. (Supp. III) § 1653(f). This was, we submit, a clear violation of the statute and the acquisitions made as a result of that violation should not bring the Secretary within the narrow exception to *Thorpe*. Moreover, the record demonstrates that the acquisition of much of the right-of-way leading to the park had been completed prior to the 1968 determination. (A. 36) The acquisition of the right-of-way leading to this park *prior* to the 1968 determination is no basis for concluding that it would be a "manifest injustice" to hold the DOT Order applicable to the 1968 determination.

2. Secretary Volpe, while now conceding that the courts below erred in granting and affirming summary judgment for respondents on the basis of affidavits characterizing documents which are included in the "administrative record," and agreeing that a remand is necessary in this case, seeks to impose unwarranted limitations on the conditions of that remand. The Secretary requests a remand solely for the purpose of introducing the "administrative record" and seeks to limit the further proceedings to a motion for summary judgment on which the district court would determine whether the Secretary's actions were arbitrary and capricious. (Brief for Secretary at 30, 34, 35, 36) We suggest that if this Court remands to the district court, it should not order the district court to resolve the issues in this case on a motion for summary judgment. The terms of the remand should permit the district court to hold whatever kind of hearing or proceeding that appears necessary, in light of the evidence offered, to resolve the issues before it. It would be a mistake to attempt to limit the nature of the proceedings in the lower courts before the "administrative record" has been introduced. For instance

once that "record" is introduced, the district court might well conclude that the documents presented by the Secretary are not adequate to reveal the basis for his decisions. The mere fact that the Department has a "carton" (Brief for Secretary fn. 31) of documents which it characterizes as the "administrative record" is not dispositive of whether there is a record that adequately reveals the basis for the Secretary's action. For example in *D.C. Federation of Civic Ass'n v. Volpe*, 316 F. Supp. 754 (D.D.C. 1970), despite the fact that over 100 exhibits were introduced, the majority of which were obtained by discovery from the Department of Transportation, the district court found that there was no "meaningful administrative record" and a trial was necessary. The same was true in *Road Review League, Town of Bedford v. Boyd*, 270 F. Supp. 650 (S.D.N.Y. 1967) and *Triangle Improvement Council v. Ritchie*, 314 F. Supp. 20 (D.W.Va. 1969), *aff'd*, 429 F.2d 423 (4th Cir.), *certiorari granted*, December 21, 1970, No. 712, this Term. Additionally in *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department, et al.*, No. 1011, this Term, *certiorari denied*, December 21, 1970, the Secretary introduced not only documents on which his determination was based, but he also found it necessary to supplement those with affidavits to explain what decisions were made and why. Thus it seems likely that in this case, since there was never any "record" in the formal sense of the term, it will still be necessary, as in the cases above, to hear additional evidence even after the Secretary has introduced those documents which he contends represent the complete administrative record. This Court should not foreclose, at this time and on this record, the district court from hearing such evidence.

Furthermore the Secretary concedes (Brief for Secretary at p. 25 fn. 25, pp. 40-42) that in approving projects of this nature, he considers evidence in addition to that submitted at the public hearings. Indeed, he states the public hearings "comprise but a small part" of the evidence con-

sidered. (Brief at 41-42) In this case, insofar as he relied on evidence not submitted at the public hearings, the Secretary acted on evidence which those challenging his decision have had no opportunity to rebut. Petitioners should not be foreclosed by the terms of any remand from presenting competent and relevant evidence which would rebut this evidence relied on by the Secretary. This Court has held on a number of occasions that one attacking administrative decisions must be given an opportunity to meet the evidence relied upon by the Administrator. *E.g., Morgan v. United States,* 304 U.S. 1, 18-20 (1938); *Gonzales v. United States,* 348 U.S. 407 (1955). *Cf. United States v. Utah Construction Co.,* 384 U.S. 394, 422 (1966); Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 186-92, 1 Davis ADMINISTRATIVE LAW 412.[1] Two examples indicate the necessity for such evidence. If the documents introduced indicate that the Secretary rejected a depressed design on the ground that a pump required to aid drainage is unsafe and therefore "impossible," petitioners should be allowed to show that the Department of Transportation has approved for use in the interstate system the very same type of pump that would be required here. (A. 76-77) (Recent decisions by the Administrator inconsistent with that under review are relevant as to whether the statutory standard has been followed. *NLRB v. Metropolitan Life Ins. Co.,* 380 U.S. 438, 440, 442 (1965).) Similarly if the "administrative record" indicates that the Secretary ruled out use of a siphon because it would "require an open pool creating a malarial hazard and danger to human and animal life" (A. 29), surely it would be relevant to show that the Department of the Interior is involved in projects involving

[1] Davis says:

> "a party who has a sufficient interest or right at stake in a determination of governmental action should be entitled to an opportunity to know and to meet, with the weapons of rebuttal evidence, cross-examination, and argument, unfavorable evidence of adjudicative facts . . . ." 1 Davis, ADMINISTRATIVE LAW at 412.

siphons and has determined that these problems cited by the Secretary can be overcome with "no undue difficulty." (A. 76)[2]

It is important to emphasize that the question of the nature of the proceeding to be held in the district court is separate and distinct from the standard of review of the Secretary's decision. The Secretary appears to argue that any proceeding other than a review on a motion for summary judgment would amount to a wholly *de novo* proceeding with a court substituting its judgment for that of the Secretary. (Brief for the Secretary at 34, 42) That is not the case at all. Indeed in at least three of the cases relied on by the Secretary as stating the proper standard of review, *Udall v. Washington, Virginia and Maryland Coach Co.*, 398 F.2d 765 (D.C. Cir. 1968); *Nashville I-40 Steering Committee v. Ellington*, 387 F.2d 179 (6th Cir. 1967), *cert. denied*, 390 U.S. 921 (1968), and *D.C. Federation of Civic Ass'n v. Volpe*, 316 F.Supp. 754 (D. D.C. 1970), the courts conducted trials and made *de novo* factual determinations. Thus regardless of whether the district court is to review the Secretary's actions under the "arbitrary and capricious," the "substantial evidence," or the "unwarranted by the facts" standard, it should not be foreclosed from receiving evidence *de novo*. *See also*, Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 187.

Thus we submit that if this Court remands the case, it should not require that the district court resolve the issues solely on the government's motion for summary judgment. Instead, the case should be remanded for purposes of determining whether the Secretary has complied with the stat-

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[2] The Secretary has not objected to the relevancy of this evidence contained in affidavits submitted by petitioners.

utes, thereby permitting the court to receive whatever evidence may be relevant.

Respectfully submitted,

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